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**STATE OF WISCONSIN  
Division of Hearings and Appeals**

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In the Matter of

[REDACTED]  
[REDACTED]  
[REDACTED]

DECISION

FCP/166255

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**PRELIMINARY RECITALS**

Pursuant to a petition filed May 26, 2015, under Wis. Admin. Code § DHS 10.55, to review a decision by the Milwaukee Co. Dept. on Aging-ARC in regard to Family Care program eligibility, a hearing was held on July 22, 2015, by telephone. A hearing set for June 23, 2015, was rescheduled at the petitioner's request. The hearing record was held open for a submission from the petitioner, which was received.

The issue for determination is whether the agency correctly determined that the petitioner does not satisfy the functional eligibility requirement for the Family Care program (FC).

There appeared at that time the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]  
[REDACTED]  
[REDACTED]

I

Respondent:

Department of Health Services  
1 West Wilson Street, Room 651  
Madison, Wisconsin 53703

By: [REDACTED] QI Coordinator  
Milwaukee Co. Dept. on Aging-ARC  
1220 W. Vliet St.  
Milwaukee, WI 53205

**ADMINISTRATIVE LAW JUDGE:**

Nancy J. Gagnon  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner is a resident of Milwaukee County.

2. To be eligible for FC, the recipient must undergo a functional screening to determine whether she has functional care needs at the requisite level. The petitioner underwent such a functional screening on April 28, 2015.
3. As a result of the 2015 functional screening, the FC program determined that the petitioner was not functionally eligible for the program. In May 2015, the FC agency issued notice to the petitioner advising her that she was denied for “nursing home level” FC benefits due to her failure to satisfy the nursing home related functional eligibility requirements of the program. The petitioner timely appealed.
4. The petitioner, age 63, has diagnoses of chronic back pain/lumbago, abnormality of gait, GERD, migraines, complex partial epileptic seizures, pseudoseizures (perhaps due to depakote), depression, anxiety disorder, anemia, hypokalemia (potassium deficiency), and hypertension. For purposes of FC program eligibility, the petitioner has a “long-term condition.” The petitioner’s full scale WAIS IQ is 55, and she professes to be illiterate. At 5’6” tall, and 179 pounds, the petitioner is overweight.
5. *ADLs.* The petitioner is ambulatory and independent in eating, toileting, and grooming. The petitioner requires some physical assistance with bathing, lower body dressing, and transfers. She ambulates with a cane or walker (and a wheelchair for longer distances).
6. *Instrumental ADLs.* The petitioner does need physical assistance with meal preparation, money management, laundry and household chores. Help with medication administration is needed twice weekly or less. She is independent in the use of a telephone, and has never driven an automobile. The petitioner is not employed, and receives Social Security Disability benefits. She does not require overnight supervision. The petitioner is fully communicative, is not physically resistive to care, does not wander, has not demonstrated self-injurious behavior, is not violent towards others, and does not engage in substance abuse. She does require outpatient mental health services.

### DISCUSSION

The Family Care program, which is supervised by the Department of Health Services, is designed to provide appropriate long-term care services for physically/developmentally disabled or elderly adults. *See*, Wis. Stat. §46.286, and Wis. Admin. Code ch. DHS 10. Whenever the local Family Care program decides that a person is not eligible for the program, she is allowed to file a fair hearing request. The petitioner did so here.

In order to qualify for FC services, with certain exceptions not applicable here, a person’s functioning must be such that they would otherwise require institutional care. Wis. Stat. §46.286(1)(a). Essentially, a person must require some sort of in-home care or therapy that reaches a level of nursing facility care. To be found eligible, the applicant must undergo an assessment of his/her needs and functioning.

#### I. THE DHS COMPUTERIZED SCREENING TOOL DETERMINED THAT THE PETITIONER IS NOT FUNCTIONALLY ELIGIBLE AT THE “NURSING HOME CARE LEVEL.”

The Wisconsin Department of Health Services has made efforts to improve the statewide accuracy of functional assessments by implementing a computerized functional assessment screening system. This system relies upon a face-to-face interview with a trained screener.

This screener asks the applicant/recipient questions about his/her medical conditions, needs, cares, skills, activities of daily living, and utilization of professional medical providers to meet these needs. The assessor then submits the “Functional Screen Report” for the applicant to the Department’s Division of Long Term

Care. The Department then evaluates the Long Term Functional Screen data by computer programming to see if the applicant/recipient meets any of the nursing levels of care.

When the petitioner's functional ability scores were entered into the DHS algorithm, the result was a DHS conclusion that the petitioner does not have care needs at the nursing home level. Thus, the petitioner was found to be ineligible going forward, consistent with the DHS-directed result.

## II. INDEPENDENTLY OF THE DHS LOC ALGORITHM, I CONCLUDE THAT THE PETITIONER DOES MEET THE COMPREHENSIVE FUNCTIONAL CAPACITY LEVEL AT THIS TIME.

The petitioner argues that she has care needs, due to her lower back pain, which make FC program benefits necessary for her.

Independently of the DHS computerized result, this ALJ's overall sense of the petitioner's care level is that it does just barely rise to the "comprehensive functional capacity level" required in the state code. In code, the verbally expressed standard, as opposed to a computer algorithm, for the requisite level of care is as follows:

### **DHS 10.33 Conditions of functional eligibility.**

...

**(2) DETERMINATION OF FUNCTIONAL ELIGIBILITY.** (a) *Determination.* Functional eligibility for the family care benefit shall be determined pursuant to s. 46.286 (1), Stats., and this chapter, using a uniform functional screening prescribed by the department. To have functional eligibility for the family care benefit, the functional eligibility condition under par. (b) shall be met and, except as provided under sub. (3), the functional capacity level under par. (c) or (d) shall be met.

(b) *Long-term condition.* The person shall have a long-term or irreversible condition.

(c) *Comprehensive functional capacity level.* A person is functionally eligible at the comprehensive level if the person requires ongoing care, assistance or supervision from another person, as is evidenced by any of the following findings from application of the functional screening:

**1. The person cannot safely or appropriately perform 3 or more activities of daily living.**

2. The person cannot safely or appropriately perform 2 or more ADLs and one or more instrumental activities of daily living.

3. The person cannot safely or appropriately perform 5 or more IADLs.

4. The person cannot safely or appropriately perform one or more ADL and 3 or more IADLs and has cognitive impairment.

5. The person cannot safely or appropriately perform 4 or more IADLs and has cognitive impairment.

6. The person has a complicating condition that limits the person's ability to independently meet his or her needs as evidenced by meeting both of the following conditions:

a. The person requires frequent medical or social intervention to safely maintain an acceptable health or developmental status; or requires frequent changes in service due to intermittent or unpredictable changes in his or her condition; or requires a range of medical or social interventions due to a multiplicity of conditions.

b. The person has a developmental disability that requires specialized services; or has impaired cognition exhibited by memory deficits or disorientation to person, place or

time; or has impaired decision making ability exhibited by wandering, physical abuse of self or others, self-neglect or resistance to needed care.

(emphasis added)

Wis. Admin. Code §DHS 10.33(2)(a)-(c) (November 2009). IADLs are defined at §DHS 10.13(32). The petitioner cannot perform three ADLs unassisted (bathing, dressing, transfers), and cannot perform several IADLs unassisted (*e.g.*, money management).

The agency acknowledged that the petitioner has lower back pain that impairs her ability to perform ADLs, but asserted that the medical documentation did not support a physical basis for the pain. However, the MRI study from March 2015 did find L3-4 asymmetric left lateral, left foraminal, left far lateral and asymmetric right foraminal disc bulging. Disc material contacts the descending left L4 nerve root in the left lateral recess. At L4-5, there is an anterior disc osteophyte complex and a posterior disc bulge. These findings could lead a reviewer to conclude that the petitioner does suffer lower back pain.

Because the petitioner does lack the ability to perform three ADLs, she does meet the code standard for the comprehensive functional capacity level of the functional eligibility test.

### **CONCLUSIONS OF LAW**

1. The petitioner does have care needs at the comprehensive functional capacity level at this time; therefore, she currently does satisfy the functional eligibility requirements of the FC program.

**THEREFORE, it is**

**ORDERED**

That the petition is remanded to the agency with instructions to continue the processing of the petitioner's FC application, consistent with the Conclusion of Law above. The agency shall report such continuation back to this Division within 10 days of the date of this Decision.

### **REQUEST FOR A REHEARING**

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

### **APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in

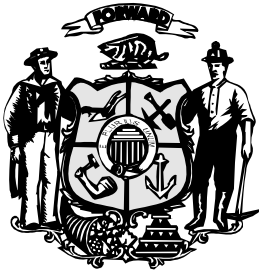
this decision as “PARTIES IN INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,  
Wisconsin, this 24th day of September, 2015

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\sNancy J. Gagnon  
Administrative Law Judge  
Division of Hearings and Appeals



**State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

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The preceding decision was sent to the following parties on September 24, 2015.

Milwaukee Cty Dept on Aging-ARC  
Office of Family Care Expansion  
Health Care Access and Accountability